

## Nursing Homes Must Prepare For Risk Of FCA Liability

By **Valarie Hays** (April 21, 2020, 3:43 PM EDT)

The federal government is putting nursing home and assisted living operators under the microscope. It is critically important that the companies operating those facilities understand the tools the government will use and what to do to prepare themselves for this increasing scrutiny.

Even before the COVID-19 pandemic struck, the U.S. Department of Justice in recent years has been ramping up its civil and criminal enforcement actions against owners and operators of nursing homes and other extended care facilities.

This ramp-up continued on March 3, when Attorney General William Barr announced the launch of the DOJ's National Nursing Home Initiative, "which will coordinate and enhance civil and criminal efforts to pursue nursing homes that provide grossly substandard care to their residents."

Thirty nursing homes in nine states were already under investigation at the time of his announcement.[1] Since the time of his announcement, over 65 nursing homes and other extended care facilities have reported COVID-19 outbreaks. The number of investigations is expected to grow rapidly as the industry faces increasing scrutiny.[2]

This anticipated growth began on April 10 when the DOJ announced that it was investigating whether Soldiers' Home, a state-run nursing facility where at least 25 veterans recently died, failed to provide its residents with adequate medical care during the coronavirus pandemic.[3] The Soldiers' Home investigation is likely just the beginning of disclosures of similar investigations across the country.

In the coming months, government agencies, whistleblowers, relatives of the resident victims, and those residents remaining in the homes undoubtedly will question whether the failure to control the spread of the infection within these facilities was caused by inadequate care and, for those facilities that have avoided outbreaks, whether they have sufficient measures in place to prevent the spread of infectious diseases going forward.

Nursing homes and other extended care facilities should prepare now for heightened scrutiny, government enforcement actions, and lawsuits focused on the quality of care.

The False Claims Act and related federal criminal laws will be the government's primary enforcement



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tools. Indeed, a DOJ representative made a public statement on March 17 that the DOJ is “committed to pursuing” violations of the FCA “especially during this critical time as our nation responds to the outbreak of COVID-19.”[4]

If history is any guide, in order to utilize the FCA, the government will contend that the owner or operator of the facility at issue made false statements to the federal Medicare and Medicaid programs when submitting bills seeking reimbursement for services provided to the residents.

One common legal theory that the government utilizes is that when facilities submit bills to Medicare or Medicaid, they implicitly certify that the services were provided in accordance with all applicable federal statutes, regulations and rules, including the Nursing Home Reform Act, which requires nursing homes, among other things, to “provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, in accordance with a written plan of care.”[5]

The government will further contend that since the care was grossly substandard and led to the spread of COVID-19, the certification was false and the facilities really provided inadequate or worthless services, and therefore, the False Claims Act was violated.

What is at stake? Violations of the FCA carry a penalty of several thousand dollars per false claim (currently, with inflation, the per claim penalty is between \$11,463 and \$23,331) plus treble the amount of the government’s damages. Any such alleged false claims also potentially could be charged under several federal criminal statutes, including the “criminal false claims act,” health care fraud, mail fraud and wire fraud, among others.

If convicted, companies face substantial fines and debarment from participation in the Medicare and Medicaid programs, which effectively put the companies out of business. The individual owners and operators face jail time.

The criminal false claims statute and the mail and wire fraud statutes carry a maximum criminal fine of \$250,000 for each act charged and for individuals, a maximum of five years’ imprisonment. The health care fraud statute carries a maximum fine of \$250,000 and a maximum term of imprisonment of 10 years for each act charged, but if the crime results in serious bodily harm, the maximum is 20 years imprisonment. If the crime results in death, the maximum sentence is life imprisonment.

Pursuing cases of substandard nursing care as false claims is not a novel theory. Outside the COVID-19 context, the government has used this theory in recent years to bring both civil and criminal enforcement actions against nursing home owners and operators that allegedly provided substandard care to its residents.

For example, in early 2019, the DOJ and the state of Tennessee sued Vanguard Healthcare LLC and its majority owner and former director of operations for FCA violations caused by billing Medicare and Medicaid programs for “grossly substandard nursing home facilities,” which, among other issues, failed to provide standard infection control. The defendants paid over \$18 million to settle the claims.[6]

In 2012, a Georgia nursing home operator, George Houser, was sentenced to 20 years imprisonment and ordered to pay more than \$7 million in restitution after being charged with defrauding Medicare and Georgia Medicaid programs by billing the programs for “worthless services” at three nursing homes. The services were alleged to be worthless since the nursing homes suffered from poor sanitary conditions, staff shortages, and safety issues.[7]

What can be done in the face of these allegations? This is one area where an ounce of prevention is worth far more than remedial actions. A thoughtful compliance program is the best weapon a company can wield against any government allegation of endemic fraud. If you have a compliance program, now would be a propitious time to revisit it and ensure that it encompasses COVID-19 issues. The time to launch these programs and tune ups is now, before you are aware of an investigation.

To maximize resident safety in the wake of the coronavirus pandemic and to be in the best position to defend against claims of grossly inadequate care, owners and operators of nursing homes and other extended care facilities should take proactive measures to ensure they have an effective compliance program in place.

These measures should include:

- Ensuring compliance with COVID-19 specific policies and procedures, including the U.S. Centers for Disease Control and Prevention, the U.S. Department of Health and Human Services, the Centers for Medicare & Medicaid Services, state agencies, and industry requirements;
- Assessing whether their own written policies are current and sufficient;
- Providing an anonymous reporting hotline for whistleblowers;
- Providing mandatory employee training related to the proper care of residents and procedures for preventing the spread of infectious diseases;
- Conducting periodic risk assessments, including a review of prior incident reports, surveys, and complaints and ensuring all safety concerns previously raised have been addressed;
- Collecting and memorializing facts relating to COVID-19 and/or allegations of substandard care or conditions; and
- Promptly implementing remedial measures in response to investigative findings, if needed.

The government relies heavily on its evaluation of the strength of facilities' compliance programs when determining whether civil or criminal enforcement is appropriate, the amount of fines to impose, and whether a corporate integrity agreement and/or monitor is necessary.

All is not lost even when the government makes allegations against nursing homes or assisted living owners and operators. There are potential defenses to these types of government allegations that nursing homes under investigation should consider in consultation with their legal counsel.

For example, there may be a defense that the government cannot prove actual knowledge or reckless disregard for the truth or falsity of a claim since the facilities engaged in affirmative efforts to be compliant with federal, state, and industry requirements. Defense counsel also may have grounds to challenge the government's claim that the billed services were in fact worthless.[8]

Additionally, depending on the facts of the case, defense counsel might be able to argue that the government cannot meet its burden of proof on the false claim materiality requirement because the government continued to pay claims after being informed of negative survey findings pertaining to the

quality of care provided by the facilities currently under investigation.[9] Furthermore, nursing homes commonly have complex corporate structures, and there may be legal arguments to pursue related to who is actually responsible for any alleged false statements.[10]

In the criminal arena, the government faces the additional challenge of proving that a defendant knowingly and willfully carried out a scheme to defraud and acted with specific intent to defraud. In this context, proof that the defendant knew the billed services were “worthless” because they failed to protect the residents from the highly transmittable COVID-19 virus could be a roadblock for the government. Presumably, to mitigate this legal challenge, the government will focus on facilities that have broader substandard care issues. This strategy would best align with the U.S. Court of Appeals for the Eleventh Circuit’s ruling in *U.S. v. Houser*.[11]

Houser’s defense counsel argued that the FCA’s reliance on the “worthless services” concept cannot be carried over into criminal cases because it would make the statute void as unconstitutionally vague.[12] Defense counsel reasoned that “determining at what point health care services have crossed the line from merely bad to criminally worthless” would require guessing.[13]

The Eleventh Circuit declined to “draw the proverbial line in the sand for purposes of determining when clearly substandard services become ‘worthless.’”[14] Instead, the court focused on the fact that Houser also was convicted of billing for services that were not provided at all.[15]

The Eleventh Circuit’s decision in *Houser* could be viewed as a warning to the government to take a more moderate approach in criminal prosecutions involving false claims allegations, but the DOJ’s National Nursing Home Initiative and recent statements by Attorney General Barr suggest that the DOJ will continue to pursue aggressive criminal enforcement in grossly substandard care cases.

All signs indicate that the scrutiny of nursing homes and other assisted living facilities will not be ending anytime soon. Owners and operators should consider what they can do now to maximize patient safety and minimize the risk of substantial fines and criminal prosecution.

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[1] U.S. Department of Justice Launches National Nursing Home Initiative <https://www.justice.gov/opa/pr/department-justice-launches-national-nursing-home-initiative>.

[2] New York Times. “Coronavirus in the U.S.: Latest Map and Case Count” <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

[3] U.S. Department of Justice. “Federal Investigation into Conditions at a Nursing Home for Veterans in Massachusetts Announced.”

<https://www.justice.gov/opa/pr/federal-investigation-conditions-nursing-home-veterans-massachusetts-announced>.

[4] Bloomberg Law. "Coronavirus False Claims Task Force Urged at Justice Department." <https://news.bloomberglaw.com/health-law-and-business/coronavirus-false-claims-task-force-urged-at-justice-department>.

[5] 42 U.S.C. § 1395i-3(b)(2).

[6] U.S. Department of Justice. "Vanguard Healthcare Agrees to Resolve Federal and State False Claims Act Liability."

<https://www.justice.gov/opa/pr/vanguard-healthcare-agrees-resolve-federal-and-state-false-claims-act-liability>.

[7] Federal Bureau of Investigations. "Former Nursing Home Operator Sentenced to Prison for 20 Years for Health Care Fraud and Tax Fraud." <https://archives.fbi.gov/archives/atlanta/press-releases/2012/former-nursing-home-operator-sentenced-to-prison-for-20-years-for-health-care-fraud-and-tax-fraud>.

[8] See Lynch, Susan Carney and McIntyre, Ellen Bowden, "Seeking Justice: The Department of Justice's Civil and Criminal Tools and Strategies to Bring to Justice Nursing Homes Who Provide Grossly Substandard Care to Our Nation's Elderly Residents," DOJ Journal of Federal Law and Practice (December 2018), p. 121.

[9] Id. at 121-22.

[10] Id. at 123.

[11] U.S. v. Houser, 754 F.3d 1335 (11th Cir. 2014).

[12] Id. at 1344.

[13] Id.

[14] Id.

[15] Id. at 1344-48.